

BIENSTOCK & CLARK
A Partnership Including Professional Associations
5360 HOLIDAY TERRACE
KALAMAZOO, MICHIGAN 49009
TELEPHONE: 616-353-3900
FACSIMILE: 616-353-3908

Eric E. Breisach*
*Also admitted in Illinois

December 7, 1998

RECEIVED

DEC - 7 1998

HAND DELIVERED

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

RE: Petition to Strike and Deny Motion to Dismiss

Dear Ms. Salas:

We enclose for filing an original and three copies of the Petition to Strike and Deny Motion to Dismiss. We also enclose an additional copy to be file stamped as received and returned in the enclosed pre-paid envelope.

Please call us if you have any questions or comments.

Very truly yours,

BIENSTOCK & CLARK



Eric E. Breisach

No. of Copies rec'd 013
List ABCDE

cc: Margaret Egler
Chairman Kennard
Commissioner Powell
Commissioner Ness
Commissioner Tristani
Commissioner Furchgott-Roth

Town of Garden City
Minnesota Public Utility Commission
Wisconsin Public Service Commission
Iowa Utility Commissions Board
Illinois Commerce Commission
Federal Energy Regulatory Commission

Enclosures

kld/d/client/cna/salas1207PetitiontoStrike

311 South Wacker Drive, Suite 4550
Chicago, Illinois 60606
Telephone: 312-697-4965
Facsimile: 312-697-4966

200 South Biscayne, Suite 3160
Miami, Florida 33131
Telephone: 305-373-1100
Facsimile: 305-358-1226

3250 Ocean Park Boulevard, Suite 350
Santa Monica, California 90405
Telephone: 310-314-4660
Facsimile: 310-314-6662

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SUMMARY

The Commission's failure to timely act on a small cable operator's urgent pole attachment complaint involving **a system with only 60 subscribers** may result in a **\$5.9 million judicially enforceable liability within a few weeks**. Further, the court may require the small operator to withdraw this Complaint. To avoid a patently unfair result with significant adverse impact on small cable operators and their customers across the country, the Commission must act immediately to decide the underlying complaint.

Interstate Power Company, Inc.'s ("Interstate") *Motion* represents another significant step of a large, multistate power company to escape any liability for the death of a worker for a small cable company — a death that a court found could have resulted from Interstate's deliberate disregard for safety. Now, settlement discussions have placed a price tag on that liability — \$5.9 million.

Interstate's *Motion* suffers from procedural and substantive flaws that compel denial. Interstate ignores the Commission's procedural rules by filing its *Motion* without obtaining, or even seeking, leave of the Commission. Substantively, the *Motion* fails to introduce any new facts, other than the likelihood that the amount of damages will be settled, the small operator will immediately face a \$2.9 million liability and that Interstate will seek another \$3.0 million in contribution from the small operator. None of these facts support dismissal. Instead, they should compel the Commission to immediately resolve the complaint.

If Interstate escapes liability for its culpability, it will empower all electric utilities to demand whatever pole attachment terms they want against small cable. Absent a Commission decision, the broad scope of indemnification that will result may significantly increase insurance rates for all small cable businesses and result in higher customer rates.

²*Motion to Dismiss*, In the Matter of Lake Cable Partners v. Interstate Power Company, Inc., CS Docket No. 98-1 (filed November 27, 1998) (“*Motion*”).

II. THE COMMISSION SHOULD STRIKE INTERSTATE'S MOTION BECAUSE IT VIOLATES THE COMMISSION'S PLEADING RULES.

The Commission should dismiss Interstate's *Motion* as an unauthorized pleading under the Commission's rules. Section 1.1407 of the Commission's rules identifies the pleadings parties may file in a pole attachment complaint proceeding.³ Other than the filing of a response and a reply, Section 1.1407(a) prohibits other filings or motions except as provided in Section 1.1403⁴ or authorized by the Commission. Significantly, Section 1.1407(a) requires that "a party . . . obtain Commission authorization before filing separate, supplemental pleadings."⁵

Interstate lacks the requisite Commission approval to file its *Motion*. Interstate's *Motion* incorrectly alleges that actions subsequent to the filing of the pole attachment complaint rendered the complaint moot.⁶ The Commission had not requested additional information and Interstate did not request leave to file its *Motion*. Because the Commission

³ See generally 47 C.F.R. § 1.1407.

⁴ Section 1.1403 authorizes the filing of a "Petition for Temporary Stay" in certain instances. See 47 C.F.R. § 1.1403(d). It has no application in this matter.

⁵ See *WB Cable Associates Ltd. d/b/a West Boca Cablevision v. Florida Power & Light Company*, Order, 8 FCC Rcd 383, at note 5 (Chief, Common Carrier Bur. 1993) (emphasis added); *Selkirk Communications, Inc. v. Florida Power & Light Company*, Order, 8 FCC Rcd 387, at note 5 (Chief, Common Carrier Bur. 1993). While the Common Carrier Bureau concluded that consideration of unauthorized pleadings would not prejudice the parties in those cases, as discussed below, because of its incorrect allegation and failure to provide any meaningful new facts or information to the Commission, consideration of Interstate's unauthorized pleading in the instant matter will result in prejudice to Lake Cable.

⁶ See *Motion* at 4.

has not authorized Interstate's *Motion*, the Commission should dismiss it as an unauthorized pleading and strike it from the record.

III. INTERSTATE'S MOTION LACKS MERIT

If the Commission fails to strike Interstate's *Motion* for procedural deficiencies, it must deny Interstate's *Motion* because of its lack of substance.

A. Interstate's *Motion* Fails to Provide Facts That Affect the Analysis of Lake Cable's Complaint.

The Commission should dismiss Interstate's *Motion* because it fails to raise new facts that relate to the issue in this proceeding. At issue is the reasonableness under 47 U.S.C. § 224 of the indemnification provision contained in the pole attachment agreement forced on Lake Cable Partners by Interstate Power Company, a matter undisputedly within the Commission's exclusive jurisdiction. The facts raised in Interstate's *Motion*, however, address matters related to settlement of the wrongful death action with the decedent's family. Those actions bear no relevance to the determination by this Commission of the party ultimately liable for those costs.

Expeditious resolution of pole attachment complaints underlies the Commission's procedural requirements for such complaints. In enacting these procedural rules, the Commission noted that "it is the clear legislative intent to expedite [pole attachment complaint] proceedings. We must therefore limit to the extent possible the number of pleadings filed and the time in which resolutions can be achieved."⁷

⁷ See *First Report and Order in CC Docket 78-144*, 68 F.C.C. 2d 1585, at ¶ 36 (1978) (emphasis added).

To the extent the Commission will authorize pleadings beyond those permitted by its pole attachment regulations, e.g., complaint, response, reply,⁸ those pleadings must bring to the Commission's attention newly discovered facts that are critical to the complaint's resolution. The Commission should treat supplemental pleadings in pole attachment proceedings similar to the way it governs pleadings in other proceedings that require efficient resolution of the matters involved.

In other contexts where expeditious resolution of the matter requires a strictly enforced pleading cycle, the Commission has required the moving party to demonstrate that the facts provided were previously unavailable and critical to the matter's resolution. For example, for lowest unit charge complaints, where the Commission seeks to "simplify the[ir] initial processing,"

pleadings other than the complaint and the answer to the complaint will not be accepted unless the party filing the additional pleading has demonstrated that the information presented is new and vital to the resolution of the complaint, and could not have been included in the original complaint because the facts were previously unknown or unavailable to the complainant, and could not have been discovered through reasonable efforts.⁹

Interstate's *Motion* provides no new facts that warrant dismissal of Lake Cable's pole attachment complaint. The *Motion* discusses recent actions relating to the parties' resolution of the wrongful death action. These facts, although recent, bear no relevance

⁸ See 47 C.F.R. §§ 1.1404, 1.1407.

⁹ See *In re Complaint of L. Douglas Wilder and Marshall Coleman against Station WRIC-TV Petersburg, Virginia*, Order, 9 FCC Rcd 7951, at note 1 (Chief, Mass Media Bur. 1994) (discussing *Lawton Chiles*, *Bob Martinez*, *Bill Nelson*, and *Jim Smith*, 7 FCC Rcd 6661, at note 3 (Mass Media Bur. 1992)) (emphasis added).

to the issue that the Commission has before it and therefore remain “not vital to the resolution of the complaint.”

B. Interstate Attempts to Derail a Decision on the Merits.

Interstate attempts to persuade this Commission not to decide Lake Cable's complaint on the merits. Lake Cable understands. The facts in this case reveal a large multistate power utility bullying a small cable operator into accepting unreasonable terms and conditions.¹⁰ Then, Interstate seeks enforcement of the provision, not to make it whole from some exposure caused solely by Lake Cable's attachment, but because of Interstate's own reckless actions in deliberate disregard for safety.

The reasonableness of Section 11 of the Pole Attachment Agreement was never decided by the courts in Minnesota. Those decisions, as referenced by Interstate,¹¹ dealt only with the enforceability of indemnification as a matter of Minnesota contract law. The issues raised by 47 U.S.C. § 224 remain within the exclusive jurisdiction of the Commission. The Commission's decision will determine whether Interstate or Lake Cable bears ultimate liability for the amounts paid to the dead cable worker's family. Currently, it appears that those liabilities may be settled for a total of \$5.9 million.¹² Absent Commission action, Lake Cable will ultimately be forced to pay the entire \$5.9 million plus

¹⁰*Complaint* at 3.

¹¹*Motion* at 2-3.

¹²*Id.* at 3. The *Motion* references \$2.9 million in compensatory damages that Lake Cable would pay and \$3.0 million in “compensatory” damages that Interstate would pay. The *Motion* further states that Interstate will seek “contribution” from lake cable for the additional \$3.0 million and costs.

Interstate's attorney's fees.¹³ If Interstate has its way, Lake Cable will bear all costs and Interstate will avoid paying one cent.

Commission dismissal of this matter would foreclose any possibility of Lake Cable recovering the \$5.9 million it may be forced to wrongfully pay, at least \$2.9 million of which would be payable in the next few weeks and at least \$3.0 million possibly shortly thereafter. Further Lake Cable remains concerned that in exchange for limiting damages, the court will accept Interstate's argument that Lake Cable must withdraw its *Complaint* with prejudice. This would set a dangerous precedent. Utilities could sidestep Commission jurisdiction by seeking judicial adjudication of contract law issues and persuading the courts to order that cable operators drop their proceedings at the Commission. This outcome would rob Lake Cable of its due process rights to have the Commission review the validity of Interstate's pole attachment contract.

C. Lake Cable has Acted Prudently in Pursuing Settlement.

Interstate wrongfully suggests that somehow Lake Cable has acted inappropriately in seeking to settle any liability it may face.¹⁴ That merely represents fulfillment of Lake Cable's duty to mitigate damages. Lake Cable has agreed to settle compensatory damages for \$2.9 million. Lake Cable cannot control the fact that Interstate has subsequently agreed to pay another \$3.0 million in "compensatory" damages.¹⁵

¹³*Motion* at 3 and 4 (footnote 1).

¹⁴*Id.* at 5 ("Lake Cable should be estopped from challenging the agreement while at the same time confirming and implementing it").

¹⁵*Id.* at 3.

Lake Cable finds it curious that, in a matter where substantial pre-trial litigation occurred that established the family's right to seek punitive damages for Interstate's deliberate disregard for safety, Interstate's settlement includes no component of punitive damages, only redundant compensatory damages. If categorized as compensatory damages, the Minnesota courts have held that Interstate can obtain indemnification from Lake Cable under Section 11 of the Pole Attachment Agreement. Interstate has acknowledged to the Commission that it has already sought contribution in the judicial proceeding.¹⁶ Further, Interstate has put the Commission on notice that it will seek all costs as well as potentially pursuing other actions against Lake Cable.¹⁷ Nothing Lake Cable has done impacts resolution of the underlying issues of the reasonableness of the indemnification provision under 47 U.S.C. § 224.

D. Interstate Misstates Lake Cable's Request for Relief.

Lake Cable asked the Commission to reach one of two alternate findings:

1. The provision in a pole attachment agreement requiring a cable operator to indemnify a utility for the utility's own negligence constitutes an unreasonable term and condition pursuant to 47 U.S.C. § 224.

¹⁶*Id.* at 3.

¹⁷*Id.* at 4, footnote 1, Interstate states:

The Minnesota State Court ordered Lake Cable to reimburse Interstate for all its costs incident to defending itself from the Nordstrom claims, which will be paid by Lake Cable, or by application by Interstate to the Minnesota State Court to enforce the already issued Order. Lake cable is vulnerable to suit by Interstate for its continued and damaging interference in the Nordstrom litigation and certain state law claims. None of these matters, however, involve this commission or are cognizable before it.

2. Alternatively, the indemnity provision in a pole attachment agreement that requires a cable operator to indemnify a utility for the utility's own actions or inactions where a court of competent jurisdiction classifies the utility's conduct as grossly negligent, reckless or acting in deliberate disregard, constitutes an unreasonable term or condition under 47 U.S.C. § 224.¹⁸

Interstate misleads the Commission when it restates the second prong. Interstate refers to "an award of punitive damages" rather than all damages arising from reckless conduct or deliberate disregard. It then states that the absence of an award for punitive damages renders the second request for relief moot. That is not the case. Lake Cable asked the Commission to decide whether any liability arising from that type of conduct, whether for compensatory or punitive damages, violates 47 U.S.C. § 224.

III. **THE *MOTION*'S FACTS HIGHLIGHT THE NEED FOR EXPEDITED COMMISSION ACTION**

If Interstate prevails in this matter, the Commission will allow establishment of dangerous precedent:

1. **Terms of adhesion.** The Commission will empower pole owners to continue to force harsh and unreasonable terms and conditions on cable operators, especially small cable operators.
2. **Increased safety hazards.** If utilities cannot be held financially liable for the death of a human being where that death may have resulted from the reckless conduct or deliberate disregard for safety on the part of the utility, utilities will have no financial incentive to act responsibly.

¹⁸*Complaint* at 21.

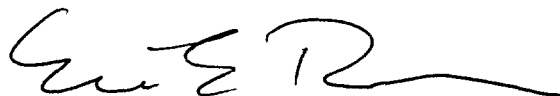
3. **Small cable rates will increase.** If allowed to stand, small cable insurance rates will likely significantly increase. The system at hand had only 60 subscribers. It will incur a \$5.9 million (and possibly higher) liability. That equates to about \$100,000 per subscriber. Higher insurance costs will necessarily mean higher cable rates for customers of small systems.
4. **Utilities will circumvent Commission proceedings.** Interstate is engaged in a race to complete the judicial processing of these matters before the Commission decides the underlying complaint. If Interstate successfully persuades the court to require Lake Cable to withdraw its *Complaint* with prejudice, it will have found a creative way to estop the Commission from exercising its exclusive jurisdiction. Other utilities will no doubt follow suit rendering any protections created by 47 U.S.C. § 224 meaningless.

Interstate's *Motion* demonstrates the length that Interstate will go to use Section 11 of the Pole Attachment Agreement to escape any financial responsibility for the death of Lake Cable's worker. The Commission's review of the undisputed facts in the underlying *Complaint* demonstrate the patent unfairness of that result.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated above, the Commission must not only strike or deny Interstate's *Motion*, but it must accelerate its review and resolve the underlying *Complaint*. Failure of the Commission to act within a timely manner on Lake Cable's *Complaint* will constitute a constructive denial. The time for Commission actions is almost gone. Lake Cable strongly urges the Commission to decide the underlying issues within the next two weeks.

Respectively submitted,
Lake Cable Partners



Eric E. Breisach
Christopher C. Cinnamon
Lisa M. Chandler
Bienstock & Clark
5360 Holiday Terrace
Kalamazoo, Michigan 49009
(616) 353-3900

Attorneys for Lake Cable Partners

December 7, 1998

CERTIFICATE OF SERVICE

I, Eric E. Breisach, a lawyer with Bienstock & Clark do hereby certify that on this 7th day of December, 1998:

1. Have arranged for hand delivery of the foregoing Petition to Strike and Deny Motion to Dismiss to each of the following:

Commissioner Harold Furchgott-Roth
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Commissioner Michael Powell
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Mr. Thomas Power
Chief Legal Assistant to Chairman Kennard
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Ms. Helgi Walker
Legal Assistant to Comm. Furchgott-Roth
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Mr. Richard Chessen
Legal Assistant to Comm. Tristani
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Mr. William Johnson
Deputy Chief Cable Services Bureau
2033 M Street N.W.
Washington, DC 20554

Ms. Margaret Egglar
Cable Services Bureau
2033 M Street, N.W.
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Ms. Susan Fox
Legal Assistant to Chairman Kennard
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Ms. Anita Wallgren
Legal Assistant to Comm. Ness
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Ms. Deborah Lathen
Chief Cable Services Bureau
2033 M Street N.W.
Washington, DC 20554

Ms. Marjorie Reed Greene
Associate Bureau Chief
2033 M Street, N.W.
Washington, DC 20554

2. Deposited a copy of the foregoing Petition to Strike and Deny Motion to Dismiss to be hand-delivered via Federal Express on the 8th day of December, 1998, to each of the following:

Ms. S. Jenell Trigg
U.S. Small Business Administration
Office of Advocacy
409 3rd Street, S.W., Suite 7800
Washington, DC 20554

Mr. William P. Bernton, Esq.
Counsel for Interstate Power
2 Mill Lane
Yarmouth Port, MA 02675-1118

Mr. David L. Hammer, Esq.
Counsel for Interstate Power
700 Locust Street, Suite 190
Dubuque, IA 52001-6824

3. Deposited a copy of the foregoing Petition to Strike and Deny Motion to Dismiss in the United States Postal Service via first-class mail, postage prepaid, to each of the following:

Iowa Utility Commissions Board
Lucas Building, 5th Floor
Des Moines, IA 50319

Illinois Commerce Commission
27 East Capitol, P.O. Box 19280
Springfield, IL 62794-9280

Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Town of Garden City
Rural Route #3, Box 9C
Lake Crystal, MN 56055

Minnesota Public Utility Commission
121 East 7th Place, Suite 350
St. Paul, MN 55101

Wisconsin Public Service Comm.
P.O. Box 7854
Madison, WI 53707-7854



Eric E. Breisach